

COPY

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

JAN - 7 1998

In the Matter of)
)
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.)
)
Petition for a Declaratory Ruling Regarding the)
Just and Reasonable Nature of, and State Law)
Challenges to, Rates Charged by CMRS Provid-)
ers When Charging for Incoming Calls and)
Charging for Calls in Whole-Minute Increments)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. 97-31
DA 97-2464

**COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

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January 7, 1998

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**COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo"), an A and B Block broad-
band PCS licensee,¹ hereby files these comments supporting the Petition for Declaratory Ruling
filed by Southwestern Bell Mobile Systems, Inc. ("SBMS") in the above-captioned proceeding.²

INTRODUCTION/SUMMARY

SBMS filed its Petition because of various class action lawsuits which have arisen
challenging the long-standing practice of many Commercial Mobile Radio Service ("CMRS")
providers to charge customers for calls in whole-minute increments and to charge for incoming

¹ PrimeCo is the broadband PCS licensee or owns a majority ownership interest and is the sole general partner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Ft. Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

² "Wireless Telecommunications Bureau Seeks Comment on a Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges To, Rates Charged by CMRS Providers When Charging For Incoming Calls and Charging for Calls in Whole-Minute Increments Filed by Southwestern Bell Mobile Systems," *Public Notice*, DA 97-2464 (rel. November 24, 1997).

calls.³ Specifically, in SBMS' case, a putative plaintiff class filed an action in federal court in Massachusetts challenging SBMS's rates for incoming calls as well as the practice of rounding-up.⁴ Insofar as the plaintiff in *Smilow* brought the action under both Section 201(b) of the Communications Act ("Act") and state law, the Court permitted SBMS to seek Commission rulings upon various issues under the doctrine of primary jurisdiction.

SBMS accordingly filed the instant Petition, requesting, *inter alia*, that the Commission declare that: (1) rounding-up and charging for incoming calls are not *per se* unjust and unreasonable pursuant to Section 201(b) of the Act; (2) challenges to the rates charged to end users by CMRS providers are exclusively governed by federal law; and (3) state law claims directly or indirectly challenging CMRS rates are barred by Section 332(c)(3) of the Act.⁵

As discussed in more detail below, PrimeCo supports SBMS' Petition. Charging for calls in whole minute increments and charging for incoming calls do not violate Section 201 of the Act. These rate practices are well-known and long-standing within the wireless industry. Indeed, many CMRS customer contracts specifically state that calls are billed in whole minute increments. Further, some billing systems will not support per-second billing as well as other alternative rate structures. In addition, flexibility with regard to rate structure, including charging in whole minute increments, serves as an important method of promoting competition

³ This billing arrangement is referred to herein as "rounding-up," because the arrangement involves rounding-up chargeable time to the next whole minute regardless of when, within the minute at issue, the call actually terminated.

⁴ *Smilo v. Southwestern Bell Mobile Systems, Inc.*, Civ. A. No. 97-10307-REK (D. Mass.).

⁵ SBMS also requested declaratory rulings that: (1) federal law establishes a general preference for competition over regulation in the CMRS marketplace; (2) "call initiation" in the CMRS context occurs when the customer activates the phone to place or receive a call; and (3) the term "rates charged" used in Section 332(c)(3) of the Act, includes at least the choice of which services to charge for and how much to charge for them.

in the CMRS marketplace. To this end, carriers frequently seek to differentiate themselves from their competitors on the basis of their rate structures. Customers are well-served by such pricing distinctions.

Moreover, it is well established that federal law and precedent reflect a fundamental policy choice in favor of federal regulation over state regulation and market competition over traditional command and control regulation for CMRS markets. Indeed, that preference was codified in Section 332(c)(3), which expressly preempts state rate and entry regulation over CMRS.

PrimeCo submits that a declaratory order addressing these issues would be useful to courts, such as the *Smilo* court, which are faced with class action lawsuits challenging CMRS rates. State law actions challenging CMRS rates can easily and improperly impinge upon federal jurisdiction over CMRS rates and entry. Thus, a clear statement from the Commission as to the scope of federal preemption of state regulation in this area would reduce the likelihood of confusion and multiple and unnecessary court rulings.

I. CHARGING IN WHOLE MINUTE INCREMENTS AND FOR INCOMING CALLS IS CONSISTENT WITH SECTION 201

Charging in whole minute increments and for incoming calls does not violate Section 201 of the Act. Section 201(b) of the Act states in pertinent part that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable.”⁶ In short, the plain language of Section 201 prohibits charging for calls in whole minute increments or charging for incoming calls *only if* such charges are “unjust” and “unreasonable.”

⁶ 47 U.S.C. § 201(b).

There is nothing to indicate that charging in whole minute increments or for incoming calls is inherently “unjust” or “unreasonable.” In point of fact, no such showing can be made. As SBMS demonstrates, both forms of charges properly reflect the costs of a CMRS provider.⁷ Charging on a whole minute basis is simply one method of collecting costs for the use of the provider’s system. As the Commission’s letter to Donald L. Pevsner attached to SBMS’s Petition indicates, mandating the CMRS carriers charge on a per-second basis would simply restructure the carrier’s rates without altering the level of costs ultimately passed through to the subscriber.⁸ The analysis is similar for incoming call charges. A CMRS carrier incurs costs associated with incoming, as well as outgoing, calls. Prohibiting a carrier from charging for incoming calls does not eliminate those costs; thus, if the practice is eliminated, a carrier will simply have to restructure its rates to recover costs for incoming calls in a different fashion.

Further, charging in whole-minute increments has long been a common practice in the CMRS industry⁹ and many carrier billing systems are not technologically capable of assessing charges in any manner other than whole minute increments.

Moreover, as discussed below, the rigors of the competitive CMRS marketplace eliminate opportunities and incentives for carriers to establish unjust or unreasonable rates. In

⁷ Petition at 7.

⁸ The Commission has already upheld charging in whole minute increments in the context of long-distance rates. See Letter from Kathleen Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (Dec. 2, 1993) (“*Levitz Letter*”). Specifically, the Commission rejected a petition for rulemaking asking that interexchange carriers be required to bill on a per-second basis. In rejecting this petition, the Commission reasoned that “it is unlikely that the rule changes you seek will reduce consumer phone bills. If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per second rates at a level designed to recover the revenues that were generated by the previous rates.” *Id.* at 1-2.

⁹ See *Cellular Mobile Systems of Tampa*, 60 Rad. Reg. 2d (P & F) 538 (1985).

other words, competition in the CMRS market is sufficient to ensure that a carrier's rates will "reflect or emulate competitive market operations" consistent with the requirements of Section 201(b), regardless of whether charges are assessed in whole minute increments.¹⁰ The Commission, therefore, should declare that charging in whole minute increments or charging for incoming calls is *not* unjust and unreasonable in violation of Section 201 of the Act.

II. SECTION 332(c)(3) BARS STATE LAW CHALLENGES TO CHARGING IN WHOLE MINUTE INCREMENTS OR FOR INCOMING CALLS

In 1993, Congress enacted the Budget Act which, *inter alia*, adopted a new Section 332(c) of the Act, establishing an exclusive federal regulatory scheme for CMRS.¹¹ To that end, Section 332(c) expressly preempted state jurisdiction over CMRS rate and entry matters. Section 332(c)(3) provides that "no State . . . shall have any authority to regulate the rates charged by any commercial mobile service" except where the state can make a factual showing that CMRS is a "substantial substitute" for land line service.¹² States carry a high burden of proof to successfully prosecute these petitions.¹³ Further, the Telecommunications Act of 1996 expressly reconfirmed the Section 332(c)(3) preemption of state regulatory

¹⁰ 47 U.S.C. § 201(b).

¹¹ Omnibus Budget and Reconciliation Act of 1993 ("Budget Act"), § 6002, 107 Stat. 312 (1993); 47 U.S.C. § 332(c).

¹² 47 U.S.C. § 332(c)(3).

¹³ *See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, 7493 (1995).

authority over CMRS rate and entry regulation.¹⁴ In essence, then, 332(c)(3) expresses “an unambiguous congressional intent to foreclose state regulation in the first instance.”¹⁵

As SBMS demonstrates, the preemptive effect of Section 332(c)(3) incorporates carrier decisions regarding rate structures, including whether to charge subscribers in whole minute increments or for incoming calls.¹⁶ Moreover, the preemptive effect extends to judicial decisions relating to such matters.

It is undisputed that like legislative or administrative actions, judicial action constitutes a form of state regulation. Thus, like state legislative action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme.¹⁷

Consequently, PrimeCo agrees with SBMS that state law challenges to CMRS rates are preempted under Section 332(c)(3).

This does not mean that all state law challenges are preempted. Section 332(c)(3) specifically preserves state jurisdiction over the specific CMRS “terms and conditions.” The determination of whether a given matter is a preempted rate challenge or a permissible challenge to CMRS “terms and conditions” would appear to turn on the basic issue brought to the court for determination. For example, as SBMS demonstrates, the decisions of CMRS carriers to charge in whole minute increments or for incoming calls are at their core attacks on carrier rate practices

¹⁴ 47 U.S.C. § 253(e) (as added by the 1996 Act).

¹⁵ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1504 (1994) (“CMRS Second Report and Order”).

¹⁶ Petition at 14.

¹⁷ *Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996), citing *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

— how carriers assess charges, what services they choose to charge for, and how much they choose to charge.¹⁸ In turn, any award of damages with regard to such practices would necessitate a judicial determination that the CMRS rates or rate structure violated state law and perhaps a further judgment as to what an appropriate or lawful rate or rate practice would have been.

The analysis is similar for a suit seeking an injunction of a given rate or rate practice. The determination of whether to enjoin a particular CMRS rate or rate structure would necessarily require a determination of whether the rates charged or the rate structure was lawful.¹⁹ It is precisely this judgment that Section 332(c)(3) *removes* from the purview of state law.

By contrast, consumer protection matters and issues that do not raise questions involving the fundamental lawfulness of a given rate or rate structure may be within the jurisdiction of the states. As SBMS recognizes, questions related to billing matters — how often a bill is sent, when a bill becomes due, or whether the carrier applied the correct CMRS rate to the subscriber — do not raise issues regarding the lawfulness of the underlying rate or rate structure. However, to the extent that any such claim presents a challenge to the way in which a carrier actually “calculates the length of a cellular phone call and the rates which are charged for such a call,” that complaint goes too far.²⁰ “[A]ny state regulation of these practices is explicitly preempted under the terms of the Act.”²¹ Accordingly, the Commission should declare that

¹⁸ See Petition at 16.

¹⁹ *Id.* at 16, 23-24.

²⁰ *Comcast*, 949 F. Supp. at 1201.

²¹ *Id.*

judicial action or state regulation regarding charging in whole minute increments or for incoming calls is preempted under the Act.

III. ISSUANCE OF A DECLARATORY RULING WILL SERVE THE PUBLIC INTEREST

As a final matter, PrimeCo submits that the declaratory ruling sought by SBMS will serve important public interest considerations. The Budget Act clearly reflects a Congressional intent to place regulation of the CMRS industry in the hands of the Commission as well as "a general preference in favor of reliance on market forces rather than regulation"²² To that end, "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need."²³ Put another way, the Budget Act and subsequent Commission decisions reflect the fundamental and reasonable proposition that the rigors of a competitive CMRS market will eliminate the incentives for carriers to charge unjust and unreasonable rates and otherwise engage in anticompetitive activities. Indeed, the Commission has long recognized that *competition* will ensure that CMRS rates practices, classifications, or regulations are just and reasonable and are not unjust or unreasonable.²⁴

²² *Petition of Arizona Corporation Comm'n to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, 10 FCC Rcd 7824, 7826 (1995); see 47 U.S.C. § 332(c)(1)(A).

²³ 10 FCC Rcd at 7826-27.

²⁴ *CMRS Second Report and Order*, 9 FCC Rcd at 1478-81. The Commission found that competitive market conditions warranted forbearance from applying Sections 203, 204, 205, 211 and 214 of the Act.

The soundness of that basic judgment is reflected in the Commission's most recent Annual Report to Congress.²⁵ According to this report, since 1995, the Commission has issued 102 MTA A and B Block licenses, most of the 493 BTA C block licenses, approximately 1400 BTA D, E, and F Block licenses for broadband PCS; 43 national and regional licenses for narrowband PCS; and 1,020 licenses for 900 MHz SMR.²⁶ Further, considering only cellular, PCS, and enhanced SMR, there could be as many as nine competitors in any particular area in the near future. Given this growth, the CMRS market is a robustly competitive market in which all carriers lack significant market power. Moreover, competition between CMRS providers will continue to increase in the future.

This level of competition has already created substantial downward pressure on service prices and roaming fees. Since 1987, bills for cellular service have declined approximately 64%.²⁷ The Commission attributes this decline in part to:

the increasing number of lower priced service packages that are attracting consumers previously unable or unwilling to purchase cellular service because of the perceived high cost of the mobile telephone and charges.²⁸

Further, as competition has increased, rate structures have become increasingly important competitive tools through which CMRS providers can distinguish themselves from their competitors. A CMRS provider's choice of rate structures is a decision driven in large

²⁵ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 7 Com. Reg. (P&F) 1 (1997).

²⁶ *Id.* at 7.

²⁷ *Id.* at 8.

²⁸ *Id.* (footnote omitted).

measure by the competitive nature of the CMRS market. For example, PrimeCo charges in whole-minute increments and is aware of no complaints from customers or state commissions regarding this practice. Moreover, PrimeCo does not charge for the first minute for incoming calls. Other carriers charge on a per minute basis, while others offer per-second billing, or flat-fee rates with various quantities of minutes free.²⁹ Similarly, some carriers charge customers for both incoming and outgoing calls, while others offer alternatives such as the first minute of incoming calls free, or, in limited cases, calling party pays.³⁰

Competition will continue to drive carriers to offer an increasing number of rate and service options. This positive scenario, however, is premised upon CMRS carriers retaining substantial flexibility with regard to rate-setting decisions.³¹ Indeed, as the Commission has recognized, mandating a particular rate structure, such as per-second charging, will be “unlikely to benefit consumers.”³² The various class action suits cited by SBMS clearly threaten to undermine or eliminate this essential flexibility.³³

Exposing CMRS carriers to state law claims against CMRS rates and rate structures, would essentially subject CMRS carriers to regulation by fifty different judicial structures. It is precisely this kind of “balkanized” regulatory policy that Section 332(c)(3) was

²⁹ Petition at 5.

³⁰ *See id.* at 5-6.

³¹ *Id.* at 6.

³² *See Levitz Letter.*

³³ *See* Petition at n.1.

intended to eliminate.³⁴ Further, as SBMS notes, “[d]isparate state regulation would raise [CMRS] providers’ operating costs,” thereby discouraging the entry of new wireless providers and the rapid development of new service offerings by hampering CMRS providers’ abilities to alter their services and rate structures to meet dynamic and rapidly evolving market demands.³⁵ Indeed, the specter of facing class action suits in each state based on existent and new rate plans or services would inhibit the rapid deployment of innovative technologies and services, without justification. Based on the foregoing, the Commission should declare that any judicial action or state regulation regarding carrier charges in whole minute increments or for incoming calls is explicitly preempted under the Act.

³⁴ See *CMRS Second Report and Order*, 9 FCC Rcd at 1504. In this regard, PrimeCo notes that the Commission is currently examining calling party pays service options in the CMRS industry. See *Calling Party Pays Service Option in the Commercial Mobile Radio Services*, WT Docket No. 97-207, 1997 FCC LEXIS 5781 (Oct. 23, 1997). Thus, permitting state law challenges to CMRS rate practices also creates a possibility that CMRS providers will be subject to conflicting state and federal rate obligations.


³⁵ See Petition at 30-31.

CONCLUSION

For the reasons discussed herein and presented in SBMS' Petition, PrimeCo urges the Commission to grant SBMS' Petition for Declaratory Ruling.

Respectfully submitted,

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January 7, 1998

CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that on this 7th day of January 1998, copies of the foregoing Comments of PrimeCo Personal Communications, L.P. were served by hand on the following:

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